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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LONNELL DESHAWN NETTLES, Defendant and Appellant.	B213854 (Los Angeles County Super. Ct. No. SA066812)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed in part, vacated in part, and remanded with directions.

Joseph S. Klapach, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Daniel C. Chang and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Lonnell Deshawn Nettles appeals from the judgment entered following his conviction by jury of selling, transporting, or offering to sell cocaine (Health & Saf. Code, § 11352, subd. (a)) with court findings that he suffered two prior felony narcotics convictions (Health & Saf. Code, § 11370.2, subd. (a)) and a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)). The court sentenced appellant to prison for five years. We affirm the judgment, except that we vacate appellant's sentence and remand the matter for resentencing with directions.

FACTUAL SUMMARY

In November 2007, Los Angeles Police Officer Brent Olsen was assigned to a narcotics abatement unit. He was participating in a narcotics investigation of the Oakwood Project, which was in the Pacific Division of the Los Angeles Police Department. As part of the investigation, Olsen was making undercover narcotics buys in the project.[1]

About 10:00 p.m. on November 7, 2007, Olsen was working undercover in the Oakwood Project area when he heard someone whistle behind him. Olsen turned around and saw appellant and a woman standing together on the sidewalk. Appellant was wearing a blue jacket and blue jeans. The woman was wearing a red jacket and blue jeans. Appellant waved at Olsen. This was a method which narcotics sellers used to attract attention.

Olsen went to appellant and the woman. Olsen asked appellant for a 40, which was street vernacular for $40 worth of cocaine. Appellant told the woman that Olsen wanted 40. Olsen got a good look at appellant's face.

Appellant began walking across the street where a recreational vehicle was parked. The woman crossed the street as well. Appellant walked behind the recreational vehicle. Olsen, about six feet from appellant and the woman, saw appellant apparently hand to the woman an object which he had retrieved from inside his rear waistband. The woman appeared to add something to the object, then handed Olsen two objects weighing

[1] Additional facts concerning the investigation are set forth in part 3 of this opinion.

.58 grams net weight and containing cocaine base. Olsen gave the woman $40, then left. Appellant was standing within two feet of Olsen and the woman when the exchange of money for drugs occurred. It was common for two people to conduct drug deals together.

Other police ultimately detained appellant and the woman, and prepared field identification cards on them. A field showup or corporeal lineup was not conducted in connection with appellant's sale but, after the sale, Olsen was shown a Department of Motor Vehicles photograph of appellant. Olsen positively identified appellant at his preliminary hearing, which was conducted in about May 2008, and identified appellant at trial.

About 10:00 p.m. on November 7, 2007, Los Angeles Police Officer Freddy Lilomaiava was working with Olsen in the same area. Lilomaiava received from Olsen a radio call which described appellant. Lilomaiava followed appellant and the woman and called for a police unit to stop appellant. A police unit detained appellant and the woman. Lilomaiava saw appellant after appellant exited the vehicle he was driving, and Lilomaiava saw that appellant was the same person whom Lilomaiava had seen walking on the street. Lilomaiava identified appellant at trial as did the officer who detained appellant. Appellant concedes Stephanie Wilkins was the woman whom Olsen and Lilomaiava had seen. Appellant presented no defense evidence.

CONTENTIONS

Appellant claims (1) the trial court violated Penal Code section 1382, by continuing his case to join it with Wilkins's case, (2) the trial court ordered said joinder based on the erroneous belief that joinder was statutorily-mandated, (3) appellant received ineffective assistance of counsel by his trial counsel's failure to seek pretrial review of the trial court's Penal Code section 1382 and joinder errors, (4) the trial court erroneously admitted evidence that appellant had participated in a major drug ring and had engaged in uncharged drug sales, (5) the case should be remanded for further proceedings on appellant's *Pitchess*[2] motions, and (6) prejudicial cumulative error

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

occurred. Respondent claims the judgment must be modified by the addition of 2 three - year Health and Safety Code section 11370.2, subdivision (a) enhancements, and the matter must be remanded to permit the trial court to impose or strike the Penal Code section 667.5, subdivision (b) enhancement.

DISCUSSION

1. *The Trial Court Did Not Violate Appellant's Rights Under Penal Code Section 1382.*

a. *Pertinent Facts*.

On April 28, 2008, an information alleging the present offense and naming only appellant as the defendant was filed, and appellant was arraigned. Sixty days after April 28, 2008, is June 27, 2008. The April 28, 2008 minute order reflects that the court continued the matter to June 6, 2008, for a pretrial conference and discovery motion, and to June 17, 2008, for jury trial.

On June 6, 2008, the court denied appellant's previously filed *Pitchess* and Penal Code section 995 motions, but provided certain discovery to appellant. Appellant suggested the court continue the case to June 17, 2008, as day "0 of 30" (*sic*) to permit appellant to review the discovery and to facilitate the prosecutor's ongoing efforts to comply with an informal discovery request. On appellant's motion, the court continued the case to June 17, 2008, for a pretrial conference and trial setting.[3] On June 16, 2008, Wilkins was arraigned on a felony complaint, and her matter was directly scheduled for a preliminary hearing on June 30, 2008.

On June 17, 2008, the court called appellant's case. The June 17, 2008 minute order reflects that appellant's case was continued for further preparation. The following

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[3] Appellant asserts that he "agreed to a limited time waiver for purpose of discovery on June 6, with the 60-day clock being re-set at that time. (RT A-5.)" However, the record does not reflect that a new 60-day period under Penal Code section 1382 began on June 6, 2008. Page A-5 of the reporter's transcript of the June 6, 2008 proceedings, as well as the minute order for that date, reflects that on that date the parties agreed that June 17, 2008 (not June 6, 2008) would be day "0 of 30" [*sic*] (not day 0 of 60). In any event, as discussed below, even if a new 60-day period began running after June 6, 2008, 60 days after June 6, 2008, is August 5, 2008. However, appellant agreed he could be tried even after that date, i.e., up to and including August 7, 2008.

then appears: "Court orders and findings: [¶] The court orders the defendant to appear on the next court date. [¶] Waives statutory time." (Some capitalization omitted.) The order then indicates that the "next scheduled event" was that the matter was continued on appellant's motion to July 17, 2008, for a pretrial conference and trial setting.[4] On June 24, 2008, appellant filed a supplemental *Pitchess* motion. All previous proceedings involving appellant occurred in Department B.

On June 30, 2008, Wilkins's preliminary hearing was conducted and she was held to answer. On July 14, 2008, Wilkins was arraigned in Department F on an information and the court scheduled her jury trial for September 2, 2008, as day 50 of 60 in her case.

On July 17, 2008, the court in Department B called appellant's case, heard appellant's supplemental *Pitchess* motion, and ordered that certain *Pitchess* discovery be provided to appellant by July 25, 2008. Discussing the next court date, appellant's counsel suggested appellant was reluctant to waive more time. Appellant's counsel indicated he wanted to continue the case to August 5, 2008, and to stipulate that August 5, 2008 would be day 8 of 10. Appellant's counsel represented he thought that that was what appellant would like to do, and it "would only require a day or two of waiving time." The prosecutor stipulated and appellant personally agreed that the court could set the matter for August 5, 2008, as day 8 of 10 for trial.[5] The court continued the matter accordingly.

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[4] The record does not contain a reporter's transcript for the June 17, 2008 proceedings. The June 17, 2008 minute order reflects July 17, 2008 as day "00 of 30." (*Sic*.)

[5] Appellant's counsel later represented to the court that he had explained to appellant that *Pitchess* discovery would be provided which would necessitate an investigation, that appellant was refusing to "waive any additional time past the 5th," (*sic*) and that appellant understood that appellant's counsel might not be able to contact all of the witnesses "in that period of time." We note that, after appellant's counsel explained that his proposed stipulation "would only require a day or two of waiving time," appellant personally stipulated that August 5, 2008, would be day 8 of 10, i.e., appellant indicated he was waiving time to August 7, 2008, not merely to August 5, 2008. Appellant concedes "defense counsel stated that Appellant was refusing to waive any

On August 1, 2008, the People filed a "motion for joinder" (capitalization omitted) of the cases of appellant and Wilkins. The written joinder motion indicated the present case arose as part of a "drugs- and gang-related sweep of the Oakwood area"; therefore, on November 7, 2007, appellant and Wilkins were identified at the scene, but were not arrested until several months later "when charges against them were filed." According to the motion, appellant was arrested first and arraigned on a felony complaint on March 28, 2008. He was held to answer at his preliminary hearing on April 14, 2008. Wilkins was arrested and then arraigned on a felony complaint on June 16, 2008. The supporting declaration of the prosecutor alleged on information and belief that appellant and Wilkins were "charged in one felony complaint" based on the same incident, i.e., a sale of rock cocaine to an undercover officer.

On August 5, 2008, the court called appellant's case for jury trial and heard the People's motion for joinder. Appellant indicated as follows. If the motion had been brought much earlier, he might not have had a problem with it. However, as of August 5, 2008, appellant was ready for trial and was not waiving time. Joining the cases would violate appellant's speedy trial rights and require him to review Wilkins's preliminary hearing transcript to determine who she was and what her role was in this matter. The motion for joinder could have been made at the last court appearance.

The prosecutor represented as follows. On June 30, 2008, following Wilkins's preliminary hearing, the prosecutor asked that Wilkins's arraignment on her information be sent to Department B, where appellant's case was. However, the preliminary hearing magistrate indicated that since Wilkins's case had been designated for Department F, the magistrate had to send it to Department F. The court stated, "Unbelievable. So the [magistrate] exalted form over substance[.]"

The prosecutor also represented as follows. On July 14, 2008, at Wilkins's arraignment on her information in Department F, the prosecutor raised the issue of

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additional time past August 5, 2008, although he was willing to, in effect, waive two-days time by setting August 5th as the 8 of 10 date for trial."

consolidating the cases, but was told to raise the issue in appellant's case on July 17, 2008, in Department B. The prosecutor, who was unable to appear in Department B on July 17, 2008, asked another prosecutor to move to consolidate the cases on that date in Department B, but apparently the motion was not made.

The court indicated as follows at various points during the hearing. The prosecutor could not consolidate the cases until Wilkins was in court. Wilkins's trial was scheduled for September 2, 2008, as day 50 of 60, she did not waive time, and there had been no continuance in her matter, so it proceeded as quickly as the law allowed. The prosecutor had no control over when someone was arrested. The court stated, "[t]he bottom line of all of it is that . . . as everyone, I think, knows, the law not only favors, but without any exception the law requires that matters jointly filed are jointly tried. It's not a preference for joint trial. It's a statutory mandate for joint trial."

The court also indicated as follows. The proceedings of appellant and Wilkins started at different times in part because appellant wanted to litigate the *Pitchess* matter. *Pitchess* compliance was scheduled for July 25, 2008. Appellant's *Pitchess* motion indicated that Wilkins, not appellant, committed the present crime; therefore, if appellant presented evidence on that issue, the People would want the evidence presented at a joint trial so Wilkins could be incriminated. The court explained that "even over and above the statutory mandate to have a joint charge against joint defendants tried jointly, in this case factually there's a reason to have it done" because evidence which might exculpate appellant might incriminate Wilkins.

According to the court, no one was at fault during the early stages of these proceedings, and even if the People had moved to consolidate at the earliest opportunity it would not have made a difference because Wilkins never waived time in her case, and appellant's proceedings were delayed because of his *Pitchess* motion.

The court granted the People's motion for joinder and ordered that appellant's jury trial be held on September 2, 2008, in Department F, where Wilkins's trial was scheduled for trial. On September 2, 2008, the court continued the case on appellant's motion to September 10, 2008. On September 10, 2008, appellant's case was brought to trial.

Appellant was not jointly tried with Wilkins. September 10, 2008 was 34 days after August 7, 2008 (i.e., day 10 of 10 pursuant to the parties' July 17, 2008 stipulation). At all pertinent times, appellant was in custody and represented by counsel.

b. *Analysis*.

Appellant claims the trial court violated Penal Code section 1382, by continuing his case to join it with Wilkins's case. For the reasons discussed below, we disagree.

(1) *Applicable Law*.

In *People v. Sutton* (2010) 48 Cal.4th 533 (*Sutton*),[6] codefendants Jackson and Sutton were jointly charged, and the trial court continued Jackson's case because his counsel was engaged in another trial. The trial court continued Sutton's case based on the unavailability of Jackson's counsel. (*Id.* at pp. 538-539.) Both defendants appealed, Sutton on the ground that the fact that Sutton was jointly charged with Jackson did not constitute, for purposes of Penal Code section 1382,[7] good cause to delay Sutton's trial. (*Sutton*, at p. 544.) The Court of Appeal rejected Sutton's argument, holding that the

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[6] *Sutton* was decided after the briefing in this case.

[7] Penal Code section 1382, states, in relevant part, "(a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: [¶] . . . [¶] (2) In a felony case, when a defendant is not brought to trial within 60 days of the defendant's arraignment on an . . . information, . . . However, an action shall not be dismissed under this paragraph if either of the following circumstances exists: [¶] (A) The defendant enters a general waiver of the 60-day trial requirement. A general waiver of the 60-day trial requirement entitles the superior court to set or continue a trial date without the sanction of dismissal should the case fail to proceed on the date set for trial. If the defendant, after proper notice to all parties, later withdraws, in open court, his or her waiver in the superior court, the defendant shall be brought to trial within 60 days of the date of that withdrawal. Upon the withdrawal of a general time waiver in open court, a trial date shall be set and all parties shall be properly notified of that date. If a general time waiver is not expressly entered, subparagraph (B) shall apply. [¶] (B) The defendant requests or consents to the setting of a trial date beyond the 60-day period. In the absence of an express general time waiver from the defendant, or upon the withdrawal of a general time waiver, the court shall set a trial date. Whenever a case is set for trial beyond the 60-day period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or within 10 days thereafter."

significant state interests served by permitting jointly charged defendants to be tried together in a single trial may constitute good cause to delay the trial of a jointly charged codefendant, and that the trial court did not abuse its discretion in finding that those interests justified the relatively brief (six-day) delay in Sutton's case. (*Id*. at pp. 544-545.)

Sutton, relying on Penal Code section 1050.1 (an initiative statute enacted in 1990)[8] and settled case law, agreed with the Court of Appeal. (*Sutton*, *supra*, 48 Cal.4th at pp. 558-562.)

Sutton stated, "although past California decisions have held that a *lengthy* continuance of an objecting codefendant's trial to facilitate a joint trial is permissible only in instances in which the state interest in avoiding multiple trials is especially compelling - as when the trials are likely to be long and complex and impose considerable burdens on numerous witnesses (see, e.g., *Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 501-506 [upholding *six-month* continuance of a complex murder trial involving numerous witnesses, where trial court found counsel for codefendants needed substantial time to prepare adequately for trial]) - when the proposed delay to permit a single joint trial is relatively brief, the substantial state interests that are served in every instance by proceeding in a single joint trial generally will support a finding of good cause to continue the codefendant's trial under section 1382, even when there is no indication that, were the defendants' trials to be severed, the

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[8] Penal Code section 1050.1, enacted as part of Proposition 115, states, "[i]n any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time."

separate trials would be unusually long or complex. [Citations.] [Fn. omitted.]" (*Sutton, supra*, 48 Cal.4th at pp. 559-560, second italics added.)

(2) *Application of the Law to This Case*.

Appellant claims "[o]n August 5, 2008, . . . the trial court continued [a]ppellant's trial well beyond the 60-day period for the sole purpose of joining his case with another recently filed case" and thereby erred. However, appellant also claims, "[t]he delay that [a]ppellant challenges in this appeal is not the delay up to the [June 6, 2008] *Pitchess* hearing (for which [a]ppellant waived time); it is the delay of 96 days *after* the *Pitchess* hearing [i.e., the 96 days after June 6, 2008, and up to and including September 10, 2008, when his case was brought to trial]." We reject appellant's claims.

First, the June 17, 2008 minute order reflects that, on that date, appellant "[w]aive[d] statutory time." This was a general waiver (Pen. Code, § 1382, subd. (a)(2)(A)) that waived the 60-day statutory time limit of June 27, 2008. That general waiver remained effective until July 17, 2008. This is because on July 17, 2008, the parties stipulated that August 5, 2008, would be the date for jury trial as day 8 of 10.[9]

Moreover, even if there was no general waiver on June 17, 2008, this matter arose from an ongoing narcotics investigation in the Oakwood Project area that resulted in numerous arrests, including the arrests of appellant and Wilkins. Through no fault of the People, appellant was apparently arrested first, then Wilkins, and their cases proceeded separately. June 27, 2008 was the 60th day after April 28, 2008, the latter date being the date of appellant's arraignment on his information.

On June 6, 2008, the court continued appellant's case on his motion, and appellant spent the period from June 6, 2008 through June 27, 2008, resolving matters for his own benefit and unrelated to Wilkins's case, i.e., a Penal Code section 995 motion, and *Pitchess* and other discovery matters. Even on and after June 28, 2008, he presumably

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9 The parties' stipulation that August 5, 2008, would be day 8 of 10 amounted to (1) a stipulated withdrawal of the June 17, 2008 general waiver, and (2) an agreement that the matter be tried on or before August 7, 2008. (See Pen. Code, § 1382, subd. (a)(2)(A) and fn. 3, *ante*.)

was not ready for trial until at least July 25, 2008, the date when the People were to provide *Pitchess* compliance. In fact, on July 17, 2008, before the People filed on August 1, 2008, their motion for joinder, appellant waived time to August 7, 2008 for trial. (See fn. 3, *ante*). Appellant cannot complain of any delay from June 6, 2008 through August 7, 2008, inclusive. (Pen. Code, § 1382, subd. (a)(2)(B).) This conclusion results from application of Penal Code section 1382, without reference to *Sutton* or the People's motion for joinder.

Appellant's jury trial was already scheduled for August 5, 2008, when, on that date, the court heard the People's motion for joinder; therefore, no delay on or before August 5, 2008 (or, for that matter August 7, 2008, given the additional two days waived by appellant) was attributable to the People's efforts to join the cases for trial.

On August 5, 2008, the court granted the People's motion for joinder and appellant's case was continued a mere 28 days to September 2, 2008, for jury trial. It is this continuance to which *Sutton* is pertinent. *Sutton* was a case in which a defendant's trial date was continued to the date to which a codefendant's trial was continued. In this respect, the present case is simpler than *Sutton*, since appellant's trial date was merely continued to Wilkins's previously set, and expedited, trial date. Moreover, appellant conceded the People could have made the motion for joinder at the previous court appearance, i.e., on July 17, 2008, which was only a few weeks earlier, and he suggested the joinder would impose no greater burden on him than his having to read Wilkins's preliminary hearing transcript. We note appellant's preliminary hearing transcript consists of 12 pages.

In light of the totality of the circumstances, the trial court did not abuse its discretion in implicitly finding good cause to delay appellant's trial from August 7, 2008 to September 2, 2008, inclusive, to permit him to be tried jointly with Wilkins, and in implicitly concluding that Penal Code section 1382 did not require dismissal of appellant's case. (Cf. *Sutton, supra,* 48 Cal.4th at p. 562.) Appellant cannot complain of any delay from August 7, 2008, through September 2, 2008, inclusive.

Appellant requested the continuance from September 2, 2008, to September 10, 2008; therefore, the delay resulting from that continuance was authorized by Penal Code section 1382, subdivision (a)(2)(B). In sum, appellant cannot complain under Penal Code section 1382, concerning the delay from June 6, 2008, through September 10, 2008, inclusive.

Finally, even if the trial court erroneously failed to deny on August 5, 2008, appellant's joinder motion and erroneously failed on that date to dismiss appellant's case pursuant to Penal Code section 1382, he has failed to demonstrate prejudice. Appellant asserts his principal defense was mistaken identity and he was "put in the untenable position of having to prove his whereabouts on a date that occurred nearly a year previously." However, this is effectively no more than an assertion of the fact of delay. Appellant did not assert below, and does not assert here, e.g., that, as a consequence of delay, witnesses became unavailable, memories faded, or evidence was lost. No delay impacted a joint trial because no joint trial occurred. There was ample evidence of guilt. There is no need to reverse the judgment since any error was not prejudicial. (Cf. *Sutton, supra,* 48 Cal.4th at p. 551; *People v. Johnson* (1980) 26 Cal.3d 557, 574-575.)

(3) *None of Appellant's Arguments Compel a Contrary Conclusion.*

Appellant relies on cases partially disapproved by *Sutton*. We thus have no need to discuss those cases.

Appellant argues the trial court erroneously believed that (1) he and Wilkins were "jointly charged" within the meaning of Penal Code section 1098,[10] and (2) Penal Code section 1098 *mandated* that appellant and Wilkins be jointly tried. However, even if appellant was not jointly charged and the section did not mandate joint trials in any event, the determination of whether to consolidate cases for trial is a matter within the trial court's discretion (*People v. Geier* (2007) 41 Cal.4th 555, 574, 576-578 (*Geier*)).

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[10] Penal Code section 1098 states in relevant part, "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials."

Moreover, "[b]ecause consolidation ordinarily promotes efficiency, the law prefers it." (*Id.* at p. 578, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 409.)

There is no dispute the offenses of appellant and Wilkins were properly joinable,[11] and considering the factors a trial court employs in determining whether to consolidate or sever cases,[12] the trial court would not have abused its discretion by consolidating them. (See *Geier, supra,* 41 Cal.4th at pp. 575-578.) The trial court stated during the hearing on the joinder motion that "the law . . . favors" joint trials, and the court expressed concern about promoting substance over form and the general fairness of joinder in this case. The thrust of the court's analysis was that the matters should be jointly tried. In light of the totality of the circumstances, we believe that, even if appellant and Wilkins were not jointly charged and Penal Code section 1098 did not mandate a joint trial in any event, the trial court would have consolidated the cases in the exercise of its discretion (see *People v. Fuhrman* (1997) 16 Cal.4th 930, 944); therefore, any erroneous belief of the trial court that appellant and Wilkins were jointly charged or that the section mandated a joint trial was not prejudicial.

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11 Confer *People v. Stathos* (1971) 17 Cal.App.3d 33, 41; Penal Code section 954 ["[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or . . . two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated."].

12 " ' "Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." ' [Citation.]" (*Geier, supra,* 41 Cal.4th at p. 575.)

Moreover, appellant cannot claim prejudice from a joint trial because no joint trial occurred. There was ample evidence of appellant's guilt. Any error by the trial court with respect to its understanding of Penal Code section 1098 was not prejudicial.[13]

2. *The Trial Court Did Not Prejudicially Misunderstand Its Authority Under Penal Code Section 1098, and Appellant Was Not Denied Effective Assistance of Counsel*.

Appellant presents related claims that the trial court erroneously believed Penal Code section 1098 mandated a joint trial, and appellant was denied effective assistance of counsel by his trial counsel's failure to seek pretrial review of the trial court's alleged Penal Code section 1382, and joinder, errors. We disagree.

We have already rejected, in part 1, *ante*, appellant's claim of prejudicial Penal Code section 1098 error. As to appellant's ineffective assistance claim and Penal Code section 1098, we rejected appellant's section 1098 claim on the ground that, at the time of the hearing on the joinder motion, the trial court would have exercised its discretion to order joint trials if the court had been apprised of its discretion. This provides a rational explanation as to why appellant's counsel may have not sought pretrial appellate review of any Penal Code section 1098 error by the trial court in connection with its August 5, 2008 order granting consolidation.

As to appellant's ineffective assistance claim and Penal Code section 1382, we have concluded no section 1382 error occurred. Moreover, even if it did, appellant does not assert that if his case had been dismissed pursuant to that section, the People could

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[13] Appellant maintains his Penal Code section 1382 argument is strengthened by the fact that he was not jointly charged. However, even if appellant was not jointly charged, *Sutton* outlined the benefits of a joint trial (see *Sutton, supra*, 48 Cal.4th at p. 560, fn. 14) in the context of *Sutton's* discussion of Penal Code section 1382, and those benefits were equally applicable here. We see no reason why those several benefits should have been foregone simply because of the fact, if true, that charges were filed separately instead of jointly. Moreover, a determination of whether good cause exists under Penal Code section 1382 to continue a case past the statutory time limit is a judicial function, not an executive function. (*Sutton,* at p. 559.) To condition the exercise of that judicial function on whether the prosecutor filed charges separately or jointly might raise a significant separation-of-powers question. (See *ibid*.)

not have refiled his case (see *Crockett v. Superior Court* (1975) 14 Cal.3d 433, 437). This provides rational explanations as to why appellant's counsel may have not sought pretrial appellate review of the alleged section 1382 error. Appellant does not demonstrate prejudicial constitutionally-deficient representation. (Cf. *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

3. *The Trial Court Did Not Err by Admitting Evidence Concerning the Oakwood Project.*

a. *Pertinent Facts.*

Prior to opening statements, appellant advised the court at sidebar that the prosecutor "intend[ed] to talk in his opening statement about this whole Oakwood Project." Appellant objected to "that" as being irrelevant.

The prosecutor thought it was relevant because the jury would wonder why appellant was not arrested on the day of the incident. The prosecutor explained that the Oakwood Project investigation had been ongoing for about six months, police compiled information on different people, and at the end of the investigation police arrested certain people. The prosecutor added that the investigation involved multiple undercover buys at the location, and arrests were not made until after the conclusion of the investigation.[14] During opening statement, the prosecutor indicated appellant committed the present offense but was not arrested on November 7, 2007, because police did not want to compromise their ongoing undercover investigation.

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[14] Appellant's counsel then stated, "[m]y problem with that, the way it sounds, it's pointing at this defendant as having some major thing going on in Oakwood rather than . . . multiple different people unrelated to him entirely." Appellant's counsel began commenting that the prosecutor "talks about this whole sweep thing," but the prosecutor interrupted, stating, "I don't have to talk about the sweep, just a little background saying there were arrests being made."

The court told the prosecutor not to go into the particulars of the sweep, but he could mention there were multiple buys from multiple persons, police did not conduct arrests until later, and "they can do it that way, you know, obviously to avoid the suggestion that he was involved in more than one of these transactions." The court and parties did not explicitly discuss the admissibility of evidence on the above issues. Later, in open court, the court told the prosecutor to proceed, and the prosecutor then gave his opening statement.

After the People's opening statement, Los Angeles Police Officer Brent Olsen testified without further objection as follows. Olsen, a peace officer for over 13 years, had been assigned to a narcotics abatement unit which was part of a narcotics enforcement team. The team handled chronic narcotics problems, crack houses, and neighborhoods where there were narcotics problems. Olsen had been assigned to narcotics for five years. He was familiar with the Oakwood Project, which was in the Los Angeles Police Department's Pacific Division. The neighborhood was historically known for heavy narcotics sales, and had been subject to a long-term narcotics investigation which began in about June 2007 and involved about 20 officers.

After describing the role of the various officers in the investigation, Olsen testified he was the undercover officer in the instant investigation and made undercover purchases of narcotics on two or three days a week for about four or five months. Olsen would establish his "street credentials" by making an undercover purchase, and then making another the next day from the same seller or from someone who had seen the previous sale. Arrests were not made instantly after an undercover narcotics buy, and the delayed arrests facilitated undercover operations.

b. *Analysis.*

Appellant claims Olsen's testimony concerning the Oakwood Project narcotics investigation was inadmissible character evidence under Evidence Code section 1101 and excludable under Evidence Code section 352.[15] We conclude otherwise. Appellant

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[15] Evidence Code section 1101, provides, in relevant part: "(a) Except as provided in this section . . . evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, . . . absence of mistake or accident, . . .) other than his or her disposition to commit such an act." Evidence Code section 352 states, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

posed a relevance objection to the prosecutor's opening statement about the "whole Oakwood Project," but posed no objection to Olsen's challenged testimony on Evidence Code section 1101 and/or 352 grounds. Appellant waived those issues. (Cf. *People v. Clark* (1992) 3 Cal.4th 41, 125-126; Evid. Code, § 353.)

Even if the issues were not waived, we find no error. An appellate court applies an abuse of discretion standard of review to any ruling by a trial court concerning Evidence Code section 1101, or Evidence Code section 352, issues. (*People v. Waidla* (2000) 22 Cal.4th 690, 717, 723-725; *People v. Memro* (1995) 11 Cal.4th 786, 864.) Evidence admitted to explain the arrest of a defendant and the circumstances surrounding it is admissible, even if other prior crimes are disclosed. (*People v. Howard* (1958) 166 Cal.App.2d 638, 650.) The challenged testimony was relevant and admissible to explain the circumstances surrounding appellant's arrest and to negate any exculpatory inference arising from the fact that appellant was not arrested on November 7, 2007. The challenged testimony was more probative than prejudicial, and no other crimes evidence was received.[16] Finally, there was ample evidence of guilt; therefore, the alleged error was not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d, 818, 836.)

4. *The Trial Court Fulfilled Its Responsibilities With Respect To Appellant's Pitchess Motions.*

a. *Pertinent Facts.*

In May 2008, appellant filed a *Pitchess* motion requesting alleged discoverable information pertaining to Olsen from his personnel file. The court summarily denied the motion on June 6, 2008.

On June 24, 2008, appellant filed a supplemental *Pitchess* motion requesting alleged discoverable information pertaining to Olsen. At the July 17, 2008 hearing on the motion, the court, Judge Robert P. O'Neill presiding, indicated appellant had made a showing of good cause warranting discovery of information from Olsen's file pertaining

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[16] We note the evidence was also relevant and admissible on the issues of motive, opportunity, intent, plan, knowledge, and absence of mistake or accident, and would not have been excludable under Evidence Code section 352 if offered on these issues.

to "issues of perjury, dishonesty, and the like." Following an in camera hearing conducted that day, the court ordered that certain *Pitchess* discovery be provided to appellant by July 25, 2008. The reporter's transcript of the proceedings in open court on July 17, 2008, reflects that a sealed transcript of the in camera hearing was lodged with the trial court. In September 2008, the jury convicted appellant in this case.

On November 3, 2008, appellant filed a "motion for discovery of *Brady* evidence" (some capitalization omitted). On December 17, 2008, the court, Judge James R. Dabney presiding, called the case, and the court and parties treated the motion as calling for *Pitchess* discovery. The court indicated a postconviction *Pitchess* motion might lie if appellant were going to seek postconviction relief, and appellant indicated he filed the motion to obtain discovery to support a motion for a new trial.

Appellant's counsel also indicated he had filed this most recent "*Pitchess* motion" because he had heard that, inter alia, defendants in other cases had filed *Pitchess* motions against Olsen, and those defendants received more discoverable information than appellant did. Counsel indicated his information was sketchy because protective orders were in effect in the other cases.

The court then conducted an in camera hearing. The reporter's transcript of the proceedings in open court on December 17, 2008, reflects that a sealed transcript of the in camera hearing was lodged with the trial court. Following the in camera hearing, the court, in open court, indicated it had conducted an in camera review for the purpose of determining whether full and complete documents were provided to Judge O'Neill in July 2008. Judge Dabney stated he was satisfied that Judge O'Neill was provided with those documents, and it was not the role of Judge Dabney to conduct a new review on a matter concerning which Judge O'Neill had ruled. Judge Dabney stated it appeared to him that the record provided was complete. In January 2009, the court sentenced appellant.

b. *Analysis*.

Appellant "requests that this Court review the sealed portions of the record in order to determine whether the procedure set forth in *People v. Guevara* [(2007)

148 Cal.App.4th 62] (*Guevara*)] was followed,"[17] and to remand the matter for further proceedings if *Guevara* was not followed. The pertinent proceedings are the July 17, 2008, and December 17, 2008, in camera proceedings.

Trial courts are granted wide discretion when ruling on motions to discover police officer personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Memro, supra,* 11 Cal.4th at p. 832.) We have reviewed the contents of the sealed transcripts of the July 17, 2008 and December 17, 2008 in camera hearings. The transcripts constitute an adequate record of the review by Judge O'Neill of any document(s) provided to him during the July 17, 2008 in camera hearing, and constitute an adequate record that any applicable responsibilities under *Guevara* were fulfilled. Said transcripts fail to demonstrate that Judge O'Neill or Judge Dabney abused his discretion to the extent either ruled there were no further items to be disclosed. (*People v. Samayoa, supra,* at p. 827; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1230, 1232; see *Guevara, supra,* 148 Cal.App.4th at pp. 67-69.)[18]

5. *Remand Is Appropriate as to the Health and Safety Code Section 11370.2, Subdivision (a), and Penal Code Section 667.5, Subdivision (b), Enhancements*.

The information alleged two Health and Safety Code section 11370.2, subdivision (a) enhancements based on two February 2003 convictions, respectively, which appellant suffered in case number SA046494, one for a violation of Health and Safety Code section

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[17] *Guevara* was a case in which the appellate court concluded that remand was necessary because the "record [was] insufficient for [the appellate court] to determine whether the trial court properly exercised its discretion in denying discovery." (*Guevara, supra,* 148 Cal.App.4th at p. 68.) Accordingly, *Guevara* stated, "in cases such as this where the custodian of records does not produce the entire personnel file for the court's review, he or she must establish on the record what documents or category of documents were included in the complete personnel file. In addition, if it is not readily apparent from the nature of the documents that they are nonresponsive or irrelevant to the discovery request, the custodian must explain his or her decision to withhold them." (*Id.* at p. 69.)

[18] In light of our resolution of appellant's contentions in this appeal, we reject his contention that prejudicial cumulative error occurred.

11352, the other for a violation of Health and Safety Code section 11351.5. The information also alleged two Penal Code section 667.5, subdivision (b) enhancements based on two November 6, 2002 convictions which appellant suffered, one in case number SA033145 for a violation of Health and Safety Code section 11350, the other in case No. SA043206 for a violation of Penal Code section 12021, subdivision (a)(1).

On January 15, 2009, the court found that appellant suffered all of the above prior convictions. The court stated appellant received concurrent two-year prison sentences for his 2002 convictions; therefore, they could support only one Penal Code section 667.5, subdivision (b) enhancement. The court suggested a three-year prison term could be imposed for each Health and Safety Code section 11370.2, subdivision (a) enhancement. The following then occurred: "[The Court:] Be that as it may, even if that is the case, I would not be inclined to impose -- based on the circumstances, I would strike one. Even if I could impose it, I wouldn't." (*Sic*.)

During the sentencing hearing, the prosecutor asked the court to sentence appellant to prison for the upper term of five years, and stated, "the People would not ask for any further prison time based on the priors." The court later stated, "since the People are seeking a sentence of high term without imposition of the enhancements, I will go along with that." The court sentenced appellant to prison for the five year upper term based on appellant's prior record and "the fact that he has four years worth of enhancements that could have been imposed, possibly seven, which the court is not going to impose." (*Sic*.) The January 15, 2009 minute order does not reflect a disposition, or reasons for any disposition, of the Health and Safety Code section 11370.2, subdivision (a) enhancements, or of the Penal Code section 667.5, subdivision (b), enhancement.

Respondent claims this Court should modify the judgment by imposing two Health and Safety Code section 11370.2, subdivision (a) enhancements. We conclude otherwise. It is clear from the trial court's sentencing comments and appellant's sentence that the court decided it would not impose the two Health and Safety Code section 11370.2, subdivision (a) enhancements. Appellant argues the trial court exercised its discretion to strike the Health and Safety Code section 11370.2, subdivision (a)

enhancements, and that the court was authorized to strike them under Penal Code section 1385. Appellant correctly observes that a trial court may, pursuant to Penal Code section 1385, strike Health and Safety Code 11370.2, subdivision (a) enhancements. (*People v. McCray* (2006) 144 Cal.App.4th 258, 267; see *People v. Meloney* (2003) 30 Cal.4th 1145, 1155-1156.)

However, neither the reporter's transcript of the January 15, 2009 sentencing proceedings nor the January 15, 2009 minute order refers to Penal Code section 1385. Neither expressly states the court struck the Health and Safety Code section 11370.2, subdivision (a) enhancements. In any event, what is fatal to appellant's suggestion that the trial court struck the two enhancements pursuant to Penal Code section 1385 is the fact that, even if the trial court intended to strike the enhancements pursuant to that section, the court failed to set forth the reasons for any such striking " 'in an order entered upon the minutes.' " (*People v. Bonnetta* (2009) 46 Cal.4th 143, 145-146, 149-151 (*Bonnetta*).)

As our Supreme Court stated in *Bonnetta*, "as the trial court's order of dismissal is ineffective, the matter must be remanded at least for the purpose of allowing the trial court to correct the defect by setting forth its reasons in a written order entered upon the minutes. Alternatively, on remand the trial court may, but need not, revisit its earlier decision, as on reflection it might determine its reasoning was flawed or incomplete. Judicial economy is furthered by allowing the trial court to correct what, upon reconsideration and reflection, it perceives to have been an unwarranted dismissal, or to consider if a dismissal should be ordered for some new or different reason. In such cases, the court must also have the power to take action such as reconvening the sentencing hearing . . . . [Citations.]" (*Bonnetta, supra*, 46 Cal.4th at p. 153.) We will remand the matter accordingly.

Respondent also claims this case should be remanded so the trial court can impose, or strike pursuant to Penal Code section 1385, the Penal Code section 667.5, subdivision (b) enhancement. We agree (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390, 401; see *People v. Irvin* (1991) 230 Cal.App.3d 180, 193), indeed, most of our analysis as to the

Health and Safety Code section 11370.2, subdivision (a) enhancements applies by analogy here.[19] We will remand the matter on this issue as well. We express no opinion as to what appellant's sentence should be following remand.

DISPOSITION

The judgment is affirmed, except that appellant's sentence is vacated and the matter is remanded to the trial court for resentencing consistent with this opinion. The trial court is directed to forward an amended abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.

[19] We reject appellant's claim that respondent is precluded by the doctrine of invited error from raising the above sentencing issues. The errors resulted in unauthorized sentences, and the doctrine of invited error does not apply to unauthorized sentences. (Cf. *In re Andrews* (1976) 18 Cal.3d 208, 212; *In re Birdwell* (1996) 50 Cal.App.4th 926, 930-931.)